Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2001

STACEY MORRELL, INDIVIDUALLY AND AS NEXT FRIEND FOR JOSHUA MORRELL, AN INFANT,

Petitioners,

v.

PHILIP MOCK, JUDY DEVRIENDT, RICHARD ACKERSON, DEPUTY HOLMAN, AND DEPUTY POLENSE,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

KENNETH N. FLAXMAN
122 South Michigan Avenue
Suite 1850
Chicago, Illinois 60603

(312) 427-3200
Attorney for Petitioner

47PP

QUESTION PRESENTED

1. Would a reasonable official have understood that execution in the state of Illinois of an *ex parte* order entered by a New Mexico judge directing that a nursing infant be taken from his mother and given to a man who sought to determine if was the father of that child would violate clearly established constitutional rights of the mother and her child when

    a. An Illinois court had refused to order enforcement of the New Mexico order without notice and hearing;

    b. The New Mexico order stated that it had been entered at the behest of a man who sought to determine if he was the baby's father;

    c. The New Mexico order did not contain any finding of unfitness;

    d. The New Mexico order did not contain any provision for supervision of the child after he had been taken from his mother;

    e. The New Mexico order did not provide for the return of the baby to his mother.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on November 1, 2001.

OPINIONS BELOW

The decision of the Court of Appeals (App. 1-19) is reported at 270 F.3d 1090. The opinion of the district court (App. 22-31) is unreported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254: The judgment of the court of appeals was entered on November 1, 2001. (App. 20.) Petitioner's timely petition for rehearing and suggestion for rehearing en banc was denied on December 12, 2001. (App. 21.)

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fourth and Fourteenth Amendments to the Constitution of the United States.

STATEMENT

As a result of orders given by then Will County prosecutors respondents Mock and DeVriendt, respondents Ackerson, Holman, and Ploense, Will County deputy sheriffs, seized the then eight month old Joshua Morrell from his mother, petitioner Stacey Morrell, and gave the nursing infant to a man, not the husband of Stacey Morrell, who removed the baby from Illinois ostensibly to determine if he was the baby's father. Mother and child were reunited after a four day separation. The Seventh Circuit held that the seizure of the nursing infant was unconstitutional but concluded that respondents were entitled to qualified immunity.

1. The New Mexico Order

On June 18, 1998, a judge of the Second Judicial District Court of Bernalillo County, New Mexico signed an *ex parte* order in a case styled "John D. Howell v. Stacey J. Morrell." The order did not contain any findings of subject matter jurisdiction; nor did the order make any adjudication of paternity or findings about the best interests of the infant. In its entirety, the New Mexico order provided as follows (App. 2-3):

> THIS MATTER came before the Court on the 18th day of June, 1998 on OTA. Petitioner was present in person and represented by Linda Latta. Respondent was not present in person and failed to appear. The Court, having heard testimony, offers of proof and argument enters the following order:
>
> IT IS FOUND IN OPEN COURT:
>
> Respondent was personally served with an order to appear at 9:00 a.m. the first business day following service. She was personally served on June 17, 1998. She failed to appear at 9:00 a.m. June 18, 1998.
>
> Respondent has intentionally been avoiding service of process in this paternity case.
>
> Respondent has wilfully failed and refused to participate in an orderly process to determine parentage.
>
> IT IS ORDERED IN OPEN COURT:
>
> I. Law Enforcement Authorities are authorized and requested to assist John D. Howell 593-05-7495 (Dob 3/1/67) in obtaining physical custody of a male child born on or about 3/17/98.

II. Upon obtaining physical custody, a parentage determination shall be undertaken. It may be undertaken in New Mexico or in South Carolina as Mr. Howell decides.

III. If parentage determination is undertaken in So. Carolina or in any other state New Mexico relinquishes jurisdiction to such other state to determine custody, visitation, and child support issues.

IV. Judgment is entered against Stacey J. Morrell in favor of John A. Howell for fees and COSTS herein of $3,000.00

2. Actions in Illinois

On November 2,1999, Howell filed the New Mexico court order in Will County, Illinois. (App. 3.) Later that day, Howell asked an Illinois judge to issue a body attachment to enforce the New Mexico order. (Id.) The Illinois judge refused to enforce the New Mexico order without notice and a hearing. Howell then sought the assistance of the Will County State's Attorney. (App. 3-4.)

Respondent DeVriendt, an assistant state's attorney, reviewed the New Mexico order. (App. 4.) DeVriendt then telephoned the Steger, Illinois police department and instructed them to enforce the New Mexico order. (Id.)

On November 2, 1998 at about 6:00 p.m., two Steger police officers came to petitioners' home and told her that they were there to take the baby Joshua because of the New Mexico order. (App. 4.) Petitioner informed the deputies that she had instituted paternity

proceedings in Indiana, showed the officers papers from that case, and pointed out the provision of paragraph 3 of the New Mexico order that "[i]f parentage determination is undertaken in So. Carolina or in any other state, New Mexico relinquishes jurisdiction to such other state to determine custody, visitation and child support issues." The Steger officers agreed with petitioner's interpretation of the New Mexico order and left.

On November 4, 1998, Howell returned to the Will County State's Attorney and reported that the Steger police had refused to enforce the New Mexico order. Defendants DeVriendt and Mock reviewed the New Mexico order and became aware that Howell had presented the order to a Will County Judge who had refused to issue an *ex parte* body attachment.[1] (Appendix 4.)

Mock concluded that the New Mexico order should be immediately enforced by the Will County Sheriff. (App. 4.) Mock knew that Howell intended to remove the baby from the State of Illinois before petitioner would have an opportunity to seek intervention from an Illinois court. The following questions and answers appear at pages 50-52 of the deposition of respondent Mock:

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1. Mock "had no knowledge of the basis for the judge's denial." (App. 17.)

Q: Did you have an understanding that Mr. Howell would take the baby with him to South Carolina?

Mock: It didn't limit him as to what he could [do] with it. In fact, I thought he might because it said, "Upon obtaining physical [51] custody, a parentage determination shall be undertaken. It may be undertaken in New Mexico or South Carolina, as Mr. Howell decides."

So, I assume that Mr. Howell had to, under this order, either take the child to New Mexico or take the child to South Carolina. (emphasis supplied)

Q: So, you didn't expect that Mr. Howell would be taking the baby and coming to a judge in Will County asking for instructions?

A: I didn't, no. It didn't say that he had to.

Q: You thought he was could take the baby to South Carolina or New Mexico?

A: I thought he was pretty much limited to those two.

But I read the Act, and he could have filed in Will County if he wanted to.

Q: But he didn't?

A: He didn't. He could have file anywhere, under the Act, but this order [52] authorized him to go to New Mexico or South Carolina to do that.

Exhibit "B" to Record Item No. 35, 50-52.

At the direction of Mock and DeVriendt, respondents Ackerson, Holman and Polense traveled to petitioner's home. The deputies knew that their mission was to take an infant from petitioner and give the baby to Mr. Howell; the deputies also knew that Howell would take the baby out of Illinois.

At petitioner's home, the deputies threatened petitioner with arrest if she did not give up her nursing infant. (App. 4.) Plaintiff informed the deputies that she had instituted paternity proceedings in Indiana, showed the officers papers from that case, and telephoned her Indiana lawyer, who spoke by telephone with the officers. Plaintiff began to cry when she was unable to persuade the deputies that the New Mexico order was unenforceable. Plaintiff repeatedly told the deputies that she was a nursing mother and that it would be unhealthy to take the baby Joshua away. The deputies did not inquire about any of the infant's special needs and took him without any medication, food, or diapers. The deputies handed the baby Joshua to Howell, who drove from the scene in his automobile. (App. 5.)

Later that afternoon, petitioner appeared before a Will County judge, who ordered respondents to retrieve the baby from Howell. (App. 5.) The baby Joshua was reunited with his mother four days later in South Carolina. (Id.)

REASONS FOR GRANTING THE WRIT

This case presents a question similar to that before the Court in *Hope v. Pelzer,* No. 00-309, certiorari granted January 9, 2002, order granting certiorari amended January 29, 2002.

State officials are entitled to qualified immunity in an action under 42 U.S.C. §1983 unless "the right allegedly violated [has been] defined at the appropriate level of specificity." *Saucier v. Katz,* 533 U.S. 194, 121 S.Ct. 2151, 2156 (2001), quoting *Wilson v. Layne,* 526 U.S. 603, 615 (1999).

In this case, respondents Mock and DeVriendt, both assistant State's Attorneys of Will County, Illinois, ordered three deputy sheriffs, respondents Ackerson, Holman, and Polense, to seize Joshua Morrell, a nursing infant, from his mother, petitioner Stacey Morrell, and give the baby to a man who was seeking to learn if he had fathered the child. Respondents knew that the "potential father" intended to take the baby from Illinois to South Carolina under color of an order signed by a New Mexico judge. Respondents also knew that the New Mexico order did not make any provision for supervision of the infant and did not require the baby's return to his mother. The deputies followed the prosecutors' orders and, by threatening to arrest petitioner, seized her child and gave the baby to the "potential father."

The Seventh Circuit held that respondents' actions were unconstitutional, (App. 5-16), but concluded that respondents were entitled to qualified immunity because there are no "authoritative cases considering analogous circumstances." (App. 17.) This demand for

"authoritative cases" transforms the qualified immunity defense into a shield that protects truly incompetent state officials from liability for outrageous violations of fundamental constitutional rights.

The rule applied by the Court of Appeals in this case was rejected by this Court in *Anderson v. Creighton,* 483 U.S. 634 (1987), when the Court refused to hold that "official action is protected by qualified immunity unless the very action in question has previously been held unlawful." Id. at 640. Instead, the determinative question is whether "[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." Id. Respondents are not entitled to qualified immunity under this standard.

Respondents should have recognized that basic principles of territorial jurisdiction required action by an Illinois court before the New Mexico order could be enforced in Illinois. Since the time that the framers considered and rejected a proposal to make "a sister-State judgment a judgment in another State,"[2] the accepted and ordinary rule has been that "the judgment of a state Court cannot be enforced out of the state by an execution issued within it." *McElmoyle ex rel. Bailey v. Cohen,* 13 Pet. (38 U.S.) 312, 325 (1839). "Any attempt to exercise authority beyond [the territorial limits

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2. *Williams v. North Carolina,* 325 U.S. 226, 229 (1945), citing Farrand, *The Records of the Federal Convention of 1787,* 447, 448.

of the State] would be deemed in every other forum, as has been said by this court, an illegitimate assumption of power, and be resisted as mere abuse." *Pennoyer v. Neff,* 95 U.S. 714, 720 (1877).

In addition, respondents should also have recognized that any order purporting to require a mother to surrender custody of her child to a man who sought to learn if he had fathered the child during an adulterous relationship would contravene the principle recognized in *Michael H. v. Gerald D.,* 491 U.S. 110 (1989) that the Constitution does not extend any protection to such a "potential father."

Finally, respondents should have recognized that taking the child from his mother without any finding of unfitness, and without any provision for supervision of the child or for returning him to his mother, would deprive petitioner of her right "to bring up children," *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923), as well as her "immediate right to care, custody, management and companionship" of her child, *May v. Anderson,* 345 U.S. 528, 533 (1953), a basic liberty that is "plain beyond the need for multiple citation," *Santosky v. Kramer,* 455 U.S. 745, 757 (1982), and which has been recognzied by the Court "on numerous occasions." *Quilloin v. Walcott,* 434 U.S. 246, 255 (1978).

Although the Seventh Circuit concluded that there is no case "considering analogous circumstances," (App. 17), petitioners' rights had been defined at "the appropriate level of specificity," *Wilson v. Layne,* 526 U.S. 603, 615 (1999), required to defeat a claim of qualified immunity. A reasonable attorney should have known that the New Mexico order was constitutionally infirm; a reasonable attorney should also have known

that the New Mexico order could not be enforced in Illinois without process issued by an Illinois court. Similarly, a reasonable deputy sheriff should have recognized the illegality of any order to take a nursing infant from his mother without a finding of unfitness.

The Seventh Circuit dismissed petitioners' argument that respondents should have known that the seizure of the infant was objectively unreasonable under the Fourth Amendment by stating that this argument was "not developed."[3] (App. 6 n.1.) Petitioners, however, had referred to the Fourth Amendment in their summary of argument (Brief of Appellant, No. 00-1429, 7th Cir., 7), and in their argument (Brief of Appellant 11-12), and set out the controlling Fourth Amendment principles by quoting from *Wooley v. City of Baton Rouge,* 211 F.3d 913, 925 (5th Cir. 2000). (Brief of Appellant 11) Qualified immunity is to be assessed "in light of all relevant authority," *Elder v. Holloway,* 510 U.S. 510, 516 (1994), and a court of appeals should not be permitted to apply novel waiver rules to create a shield for state officials who violate clearly established rights.

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3. The Seventh Circuit has declined to consider arguments raised "in a solitary footnote," *Williams v. General Elec. Capital Auto Lease, Inc.,* 159 F.3d 266 (7th Cir. 1998), or advanced without any explanation "as to how this law applied to the facts of [their] particular case." *United States v. South,* 28 F.3d 619, 629 (7th Cir. 1994).

CONCLUSION

It is therefore respectfully submitted that the petition for writ of certiorari should be granted.

March, 2002

KENNETH N. FLAXMAN
122 South Michigan Avenue
Suite 1850
Chicago, Illinois 60603
Attorney for Petitioner

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 00-1429

STACEY MORRELL, INDIVIDUALLY AND AS NEXT FRIEND FOR JOSHUA MORRELL, AN INFANT,

Plaintiffs-Appellants,

PHILIP MOCK, JUDY DEVRIENDT, RICHARD ACKERSON, DEPUTY HOLMAN, AND DEPUTY POLENSE,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois
No. 99 CV 2459—**George Lindberg** *Judge.*

Before Flaum, Chief Judge, and Kanne and Williams, Circuit Judges.

Williams, Circuit Judge. Three law enforcement officers, acting on directions from two assistant state's attorneys, took Stacey Morrell's child from her home in Illinois and gave the child to his putative father pursuant to an ex parte order issued by a New Mexico court. In this appeal we must decide if Morrell has stated a claim for deprivation, without due process, of a constitutionally protected liberty interest, and if so, whether the defendants are entitled to qualified immunity from suit. Although we hold that Morrell's allegations are sufficient to state a constitutional claim, we agree with the district court that defendants are entitled to immunity and therefore affirm the judgment of the district court.

I. BACKGROUND

A. Facts

Stacey Morrell had an affair with John Howell while both were assigned to a military base in Albuquerque, New Mexico. After the affair ended, Morrell reconciled with her husband, David, and the couple moved to El Paso, Texas, where David had been assigned for active duty. In El Paso, Stacey Morrell gave birth to Joshua Morrell. David Morrell was identified as the father on Joshua's birth certificate.

Meanwhile, Howell filed a "Petition to Establish Paternity, Custody, and Time Sharing" in a New Mexico court, and on the day before Joshua was born in El Paso, Howell attempted service on Morrell by posting a copy of the summons and petition on the premises of her former home in Albuquerque. Morrell never received that posted notice, and after she failed to enter an appearance, Howell moved for a default judgment. At a hearing on Howell's motion, New Mexico Judge Anne Kass ordered that Morrell be served by personal service and ordered her to appear in court on the day following service. That order was served on Morrell by hand delivery in El Paso, and when she failed to appear the next day, Judge Kass entered the following order:

> IT IS FOUND IN OPEN COURT:
>
> Respondent was personally served with an order to appear at 9:00 a.m. the first business day following service. She was personally served on June 17, 1998. She failed to appear at 9:00 a.m. June 18, 1998.
>
> Respondent has intentionally been avoiding service of process in this paternity case.
>
> Respondent has willfully failed and refused to participate in an orderly process to determine parentage.

IT IS ORDERED IN OPEN COURT:

I. Law Enforcement Authorities are authorized and requested to assist John D. Howell . . . in obtaining physical custody of a male child born on or about 3/17/98.

II. Upon obtaining physical custody, a parentage determination shall be undertaken. It may be undertaken in New Mexico or in South Carolina as Mr. Howell decides.

III. If parentage determination is undertaken in So. Carolina or in any other state, New Mexico relinquishes jurisdiction to such other state to determine custody, visitation and child support issues.

IV. Judgment is entered against Stacey J. Morrell in favor of John D. Howell for fees and costs herein of $3,000.00.

After the order was entered, Morrell filed a special appearance contesting jurisdiction. At about the same time, David Morrell's active duty assignment in El Paso ended, and the family moved to Stacey Morrell's parents' home in Indiana while David Morrell sought new employment. There, Stacey Morrell filed a petition to establish paternity, and Howell responded with a motion to dismiss, relying on the New Mexico court's prior assertion of jurisdiction and asserting that he had already commenced another paternity action in South Carolina (where Howell resided). While the Indiana action was pending, David Morrell secured a job in Illinois, and the Morrells moved there with Joshua.

Howell then traveled to Illinois and filed the New Mexico order with the Will County Circuit Court clerk. Howell appeared that same day on an emergency motion before the Will County Circuit Court and requested enforcement of the New Mexico order by way of a body attachment (a civil writ ordering the seizure of a person). The Illinois judge refused to issue the writ without notice to Stacey Morrell. Undeterred, Howell went to the Will County State's

Attorney's office and spoke to defendant Judy DeVriendt, an assistant state's attorney. DeVriendt telephoned the local police and told them to take custody of Joshua pursuant to the New Mexico order. When the local police went to Stacey Morrell's home, she showed them pleadings from the Indiana action. After consulting with their superiors, the police decided not to take custody of Joshua and advised Howell that they would not take further action without an order from the Will County court.

DeVriendt then consulted defendant Philip Mock, chief of the state's attorney's civil division. Mock reviewed the New Mexico order and the docket sheet from the hearing before the Will County Circuit Court, which showed that the court had denied Howell's emergency motion for a body attachment. Mock then read the Illinois Uniform Child Custody Jurisdiction Act (UCCJA), 750 Ill. Comp. Stat. 35/1, et seq., which governs the recognition in Illinois of custody determinations of other states. He also checked the circuit court's computer database to determine whether any other orders or judgments involving these parties had been filed in Will County, and directed his subordinates to verify that the New Mexico order had not been vacated. Mock concluded that the New Mexico order was valid and directed DeVriendt to have the Will County Sheriff's Department pick up the child and give him to Howell.

Defendant Richard Ackerson, an investigator with the Will County Sheriff's Department, was assigned to the case. According to Ackerson, DeVriendt showed him the New Mexico order and paperwork from the Indiana action, told him that the New Mexico order had been validated by an Illinois judge, and directed him to arrest Morrell if she did not cooperate. Acting on her instructions, Ackerson and two deputy sheriffs, defendants Richard Holman and Keith Ploense, went to the Morrells' home. As she had when the police visited a few days earlier, Morrell showed the sheriff's

deputies the paperwork from the Indiana action. She also asked them to speak by telephone with her lawyer in Indiana, who told them that the Indiana action had "superceded" the New Mexico order. Ackerson replied that he had instructions to serve the New Mexico order, which was the only one that had been "validated" in Illinois. Morrell gave Joshua to the deputies—after being threatened with arrest if she refused—and the deputies gave the eight-month-old infant to Howell. Howell immediately returned to South Carolina with Joshua.

Later that day, Morrell appeared before another judge in Will County, who ordered Mock to retrieve the baby. Joshua was reunited with his mother four days later.

B. The District Court Proceedings

Morrell filed suit on behalf of herself and Joshua claiming a deprivation, without due process, of their liberty interests in familial relations protected by the Fourteenth Amendment. After discovery, all parties moved for summary judgment. Without reaching the question of whether there had been a constitutional violation, the district court held that the deputies were absolutely immune from liability for damages arising from their execution of the court order. With respect to the assistant state's attorneys, the court held that reasonable persons in their position would not have known that ordering the child to be seized was unconstitutional, and that they were therefore entitled to qualified immunity from damages. The court therefore granted the defendants' motions for summary judgment, denied the plaintiff's cross motion for summary judgment, and entered judgment for the defendants.

II. ANALYSIS

To evaluate defendants' claim of qualified immunity under sec. 1983, the court must decide (1) whether plaintiff has stated a claim for violation of her constitutional rights, and if so, (2) whether those rights were clearly established at the time of the violation, such that a reasonable official

would understand that what he was doing violates those rights. *Wilson v. Layne*, 526 U.S. 603, 609 (1999); *Mitchell v. Randolph*, 215 F.3d 753, 755 (7th Cir. 2000). We first address the constitutionality of the defendants' conduct. *Saucier v. Katz*, 121 S.Ct. 2151, 2155-56 (2001); *Pearson v. Ramos*, 237 F.3d 881, 884 (7th Cir. 2001). On that question, "we are required to determine only whether [the plaintiff's] allegations, if true, state a claim of deprivation." *Delaney v. DeTella*, 256 F.3d 679, 683 (7th Cir. 2001); *see also Katz*, 121 S.Ct. at 2156. We review the district court's judgment *de novo*. *McGrath v. Gillis*, 44 F.3d 567, 569 (7th Cir. 1995).

A. The Constitutional Violation

Morrell contends that the New Mexico court lacked jurisdiction, and that the court's order could not be enforced in Illinois until Morrell received notice and an opportunity to be heard in Illinois. Her claim is based on a mother's liberty interest, protected by the due process clause of the Fourteenth Amendment, in the companionship, care, custody, and control of her child. *See Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 27 (1981); *Brokaw v. Mercer County*, 235 F.3d 1000, 1020 (7th Cir. 2000); *Ellis v. Hamilton*, 669 F.2d 510, 512 (7th Cir. 1982).[1] To meet the requirements of due process, the state must afford notice and an opportunity to be heard "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). We have held that, absent exigent circumstances, due process requires

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1. Morrell also asserts in a conclusory fashion that the seizure of Joshua violated the Fourth Amendment. Because the argument is not developed, it is waived. *See Williams v. Gen. Elec. Capital Auto Lease*, 159 F.3d 266, 274 (7th Cir. 1998); *United States v. South*, 28 F.3d 619, 629 (7th Cir. 1994).

a hearing before state officials may remove a child from his home. *Brokaw,* 235 F.3d at 1020; *Ellis,* 669 F.2d at 512; *accord Hollingsworth v. Hill,* 110 F.3d 733, 739 (10th Cir. 1997); *Hurlman v. Rice,* 927 F.2d 74, 79-80 (2d Cir. 1991).

Defendants do not claim that there were exigent circumstances that would justify seizing the child before notice and hearing. Instead, they argue that Morrell's constitutional claim fails because of the availability of a post-deprivation hearing in Illinois. Their argument is based on *Ellis v. Hamilton,* 669 F.2d 510, in which we held, with respect to the plaintiffs' claim that they were denied due process when various state officials allegedly blocked their efforts to adopt their grandchildren, that due process was not denied because the state provided a "variety of remedies by which to correct" the officials' alleged misbehavior. 669 F.2d at 514. However, *Ellis* is distinguishable because in that case the grandparents acquiesced in the child welfare officials' directive to turn the children over, and the children were not (as in this case) taken from the home without prior notice and under a threat of arrest. See 669 F.2d at 515. Moreover, the right of the grandparents in Ellis is less compelling than the right of a biological, custodial parent, and therefore lesser procedural protections may be consistent with due process. *See Weller v. Dep't of Soc. Servs.,* 901 F.2d 387, 394 (4th Cir. 1990) (distinguishing *Ellis* on this basis).

However, the defendants are correct that Morrell had actual notice of the New Mexico hearing (albeit less than 24 hours' notice) and then had more than four months to either raise her jurisdictional defenses in New Mexico or pursue a collateral attack elsewhere before the order was enforced. The question, then, is whether in addition to prejudgment process provided in New Mexico, Illinois must provide pre-enforcement notice and an opportunity to be heard. On this point, Morrell argues that a state may not enforce another state's order without prior notice and a hearing. She relies on cases holding that a state's judgment "cannot be enforced

out of the state by an execution issued within it." *McElmoyle ex rel. Bailey v. Cohen*, 38 U.S. 312, 325 (1839); *Williams v. North Carolina*, 325 U.S. 226, 229 (1945). But these cases do not prescribe the method that a state must use in domesticating another state's order; the method, as Morrell concedes, is determined by the local law of the enforcing state. *See Baker v. General Motors*, 522 U.S. 222, 235 (1998) (citing *McElmoyle*, 38 U.S. at 325; Restatement (Second) of Conflict of Laws sec. 99 (1969) ("The local law of the forum determines the methods by which a judgment of another state is enforced.")).[2] Morrell next relies on cases holding that the Due Process Clause establishes limits on the rendering state's exercise of jurisdiction over non-residents, and that judgments entered beyond those limits are void and may not be enforced in that state or in any other, *see, e.g., Williams*, 325 U.S. at 229-30; *Pennoyer v. Neff*, 95 U.S. 714, 720-23 (1877), and on the principle that a defendant challenging a court's jurisdiction may ignore the court's proceedings, risk a default judgment, and resist enforcement in a collateral attack on the first court's jurisdiction. *See, e.g., Williams*, 325 U.S. at 229-31; *Chicago Life Ins. Co. v. Cherry*, 244 U.S. 25, 29 (1917); *Thompson v. Whitman*, 85 U.S. 457, 469 (1873); *Bd. of Trs., Sheet Metal Workers' Nat'l Pension Fund v. Elite Erectors, Inc.*, 212 F.3d 1031, 1034-35 (7th Cir. 2000); *United States v. County of Cook*, 167 F.3d 381, 388 (7th Cir. 1999) (observing that the exception from *res judicata* for collateral attacks challenging jurisdiction is necessary "because otherwise a court that lacked jurisdiction could strong-arm a party to litigate the subject, decide in favor of its own power,

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2. The "local law" governing recognition and enforcement in Illinois of custody determinations of other states is the Uniform Child Custody Jurisdiction Act (UCCJA), 750 Ill. Comp. Stat. 35/1, et seq., the requirements of which we will later address.

and thus block any review of its adjudicatory competence.'').[3] Again, however, these cases do not establish any particular procedure that must be followed by a state asked to enforce another state's order, and do not hold that notice and a hearing on the question of the rendering state's jurisdiction must in all cases precede enforcement.

Closer to the question before us are two Supreme Court decisions considering what pre-enforcement process is due when a creditor seeks to enforce a judgment. In *Endicott-Johnson Corp. v. Encyclopedia Press, Inc.*, 266 U.S. 285 (1924), the Court held that, having received full notice and hearing on the underlying judgment, the debtor was not entitled to further notice before execution of that judgment:

> [T]he established rules of our system of jurisprudence do not require that a defendant who has been granted an opportunity to be heard and has had his day in court, should, after a judgment has been rendered against him, have a further notice and hearing before supplemental proceedings are taken to reach his property in satisfaction of the judgment. Thus, in the absence of a statutory requirement, it is not essential that he be given notice before the issuance of an execution against his tangible property; after the rendition of the judgment he must take ''notice of what will follow,'' no further notice being ''necessary to advance justice.''

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3. Of course, jurisdiction is the only issue preserved when a defendant fails to appear, and if the defendant loses on the question of jurisdiction in a collateral attack, the decision on the merits is res judicata. *See Elite Erectors, Inc.*, 212 F.3d at 1034-35; *County of Cook*, 167 F.3d at 388. Therefore, if jurisdiction is proper in the rendering court, little is to be gained by failing to appear and suffering a default.

Id. at 288 (citations omitted).

However, a later case, *Griffin v. Griffin,* 327 U.S. 220, 232 (1946), appears to narrow the holding in *Endicott.* In *Griffin,* a wife litigated and won an award of alimony, and ten years later, without notice to the husband, she obtained a judgment that alimony payments were in arrears and a writ authorizing execution of that judgment. The Court held that the failure to give notice of the later proceedings violated due process, and therefore, that the judgment could not be enforced:

> While it is undoubtedly true that the 1926 decree, taken with the New York practice on the subject, gave petitioner notice at the time of its entry that further proceedings might be taken to docket in judgment form the obligation to pay installments accruing under the decree, we find in this no ground for saying that due process does not require further notice of the time and place of such further proceedings, inasmuch as they undertook substantially to affect his rights in ways in which the 1926 decree did not.

Id. at 232.[4] The Court in *Griffin* did not make reference to *Endicott,* but many courts have interpreted *Griffin* as limiting *Endicott's* holding that notice and hearing on the underlying judgment serves as constructive notice of all that will follow. *See, e.g., McCahey v. L.P. Investors,* 774 F.2d 543, 548 (2d Cir. 1985); *Brown v. Liberty Loan Corp. of Duval,* 539 F.2d 1355, 1364-65 (5th Cir. 1976); *see also Hanner v.*

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4. *Griffin* distinguished between judgments entered with adequate prior notice and hearing (as was the case in *Endicott)* and those entered without those prejudgment procedures (which could not be enforced). *Griffin,* 327 U.S. at 233-34.

DeMarcus, 390 U.S. 736, 741-42 (1968) (Douglas, J., dissenting from the dismissal of writ of certiorari on the question of overruling *Endicott).* These cases interpret *Griffin* as holding that, at least as to issues and rights that were not litigated in the underlying judgment, such as defenses to execution on particular assets, *Endicott* does not supply the answer. *McCahey,* 774 F.2d at 547-49; *Brown,* 539 F.2d at 1364-65; *see also Aacen v. San Juan County Sheriff's Dep't,* 944 F.2d 691, 695 (10th Cir. 1991); *Dionne v. Bouley,* 757 F.2d 1344, 1351-52 (1st Cir. 1985).

Viewed in light of *Griffin,* we agree that *Endicott* does not entirely foreclose consideration of whether the Due Process Clause requires post-judgment notice or other procedures. According to Morrell, because she failed to appear in New Mexico, she retained her right to collaterally attack jurisdiction elsewhere. As to jurisdiction (without which the judgment is void), Morrell never had the "day in court" that was the basis of *Endicott's* holding that no further pre-deprivation notice was required.

In determining, then, what post-judgment process (if any) is due, we must balance the nature of the private interests at stake, the risk of harm from erroneous deprivations, and the government's interests affected. *See Mathews v. Eldridge,* 424 U.S. 319, 335 (1976); *Aacen,* 944 F.2d at 695-96; *McCahey,* 774 F.2d at 548-49; *Finberg v. Sullivan,* 634 F.2d 50, 57-58 (3d Cir. 1980) (en banc); *see also Weller,* 901 F.2d at 394. We believe that the same considerations underlying the recognition of a parent's due process right to pre-deprivation notice and hearing justify the requirement of pre-deprivation notice and some opportunity to object in the enforcing state, at least when the rendering court's order is by default. To hold otherwise would force the parent to litigate her jurisdictional objections in any state chosen by an adverse party (even if, as Morrell asserts was the case here, the state lacked any connection with the child or personal jurisdiction over the parent), or else risk enforcement without

notice in another state before she has an opportunity to mount a collateral attack. This result would be inconsistent with the due process limitations on a state's jurisdiction that the right of collateral attack protects, *see Williams,* 325 U.S. at 229; *County of Cook,* 167 F.3d at 388, and is also inconsistent with a proper balancing of the competing interests at stake.

A parent's liberty interest in her relationship with her child is of considerable importance—and "far more precious . . . than property rights." *May v. Anderson,* 345 U.S. 528, 533 (1953); *see also Lassiter,* 452 U.S. at 27; *Santosky v. Kramer,* 455 U.S. 745, 759 (1982); *Weller,* 901 F.2d at 394. And even though the interference with the mother's custody in this case was to be temporary, we cannot ignore the not insubstantial risk that once physical custody is erroneously transferred, it may never be regained. See Unif. Child Cust. Jur. Act, prefatory note, 9 U.L.A. 262, 264 (1999); Wayne Young, *Parental Child-Snatching: Out of a No-Man's-Land of Law,* 13 St. Mary's L.J. 337, 338 (1981) (estimating that, annually, as many as 100,000 children are kidnapped by a parent). The risk of erroneous deprivation is particularly grave in a case like this one in which custody was transferred based on an ex parte presentation, and when, therefore, the jurisdiction of the rendering court has not been tested in an adversarial proceeding.

We must also consider, however, the interest of the parent seeking to enforce a court's order transferring physical custody. That parent has (at least potentially) an equally important interest at stake. And once a court has recognized that parent's right to custody, that parent has an important interest in having the court's determination enforced. Pre-enforcement notice may trigger flight by the parent with physical custody, making it more difficult (and perhaps, in some cases, impossible) to enforce the order. However, the rendering court's determination of proper custody has less weight when the question of the court's jurisdiction has never been

litigated in a contested proceeding; without some procedure in the enforcing state, it is impossible for that state to determine whether the order is entitled to any weight at all. Moreover, if pre-enforcement process in the enforcing state is required, as urged by Morrell, any exigent circumstances (such as flight risk) can be considered by the enforcing court in determining whether action may be taken in advance of notice.

The state's interest, according to the defendants, is in facilitating interstate recognition and enforcement of child custody decrees and in deterring the unilateral removal of children by parents seeking to avoid jurisdiction. Illinois has addressed these interests in the Uniform Child Custody Jurisdiction Act (UCCJA), see 750 Ill. Comp. Stat. 35/2 (stating the purposes of the Act); *see also In re Marriage of Mauro,* 543 N.E.2d 856, 858 (Ill. App. Ct. 1989), which, the defendants contend, required them to enforce the New Mexico order without notice or hearing. They rely on section 16(a) of the Illinois Act, which provides for registration of out-of-state custody judgments:

> A certified copy of a custody judgment of another state may be filed in the office of the clerk of any circuit court of this State. The clerk shall treat the judgment in the same manner as a custody judgment of a circuit court of this State. A custody judgment so filed has the

same effect and shall be enforced in like manner as a custody judgment rendered by a court of this State.

750 Ill. Comp. Stat. 35/16(a)[5]

However, the UCCJA's scheme for cooperative interstate recognition of custody determinations rests on the premise that each state's interests are served by limiting the bases for a state's assertion of jurisdiction over a child custody determination, and requiring interstate recognition of only those determinations entered within those limits. See 750 Ill. Comp. Stat. 35/2; see also Unif. Child Cust. Jur. Act sec. 13 cmt., 9 U.L.A. 559 (1999).[6] To that end, Illinois law provides

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5. We accept, for purposes of this discussion, the defendants' assertion that the New Mexico order is a "custody determination" subject to the UCCJA. See 750 Ill. Comp. Stat. 35/3.02 (defining "custody determination"); *see also Pena v. Mattox,* 84 F.3d 894, 899 (7th Cir. 1996) (noting courts' disagreement about whether a decision in a paternity action is subject to the uniform act). The parties do not make anything of the distinction between custody "judgments" and "decrees," so we will ignore this difference, as well. Compare 750 Ill. Comp. Stat. 35/16(a) with Unif. Child Cust. Jur. Act sec.15(a), 9 U.L.A. 616 (1999).

6. In this context, "jurisdiction" refers to the necessary connections, specified by the statute, between the state and the controversy. See 750 Ill. Comp. Stat. 35/4; *Levy v. Levy,* 434 N.E.2d 400, 403 (Ill. App. Ct. 1982). We note that federal law follows the same approach as the UCCJA, requiring that states afford full faith and credit to those custody determinations made by a state having certain specified connections with the child or controversy. See Parental Kidnapping Prevention Act (PKPA), 28 U.S.C. §1738A. Recognition of another state's order, under the UCCJA, is also limited to those determinations made after prejudgment notice to out-of-state parents and other specified parties. See Unif. Child Cust. Jur. Act sec. 13 cmt., 9 U.L.A. 13. The minimal notice to out-of-state parties is 10 days in Illinois, 750 Ill. Comp. Stat. 35/6, and (at the time the order was entered in this case) 20 days in New Mexico. N.M. Stat. Ann. 40-10-6(a) (replaced by Unif. Child Cust. Jur. & Enf. Act

the party opposing recognition and enforcement of another state's custody determination with notice and the opportunity to be heard on whether those jurisdictional prerequisites are met. *See Gasaway v. Gasaway,* 616 N.E.2d 610, 613 (Ill. App. Ct. 1993) (describing the procedures for domesticating another state's custody judgment); *In re Marriage of Los,* 593 N.E.2d 126, 131 (Ill. App. Ct. 1992); *In re Marriage of Mauro,* 543 N.E.2d 856, 858 (Ill. App. Ct. 1989); *In re Marriage of Rogers,* 490 N.E.2d 1000, 1003 (Ill. App. Ct. 1986). Although the Illinois statute does not specify that notice and an opportunity to be heard on jurisdictional prerequisites (both constitutional and statutory) must precede enforcement, courts interpreting the Illinois and uniform acts have held that it must, in order to allow the adverse party the opportunity to contest recognition and enforcement. *See In re Marriage of Rogers,* 490 N.E.2d at 1003; *Holm v. Smilowitz,* 840 P.2d 157, 165 (Utah Ct. App. 1992); *Kilgore v. Kilgore,* 666 S.W.2d 923, 929 (Mo. Ct. App. 1984); *Wyatt v. Falhsing,* 396 So. 2d 1069, 1072-73 (Ala. Civ. App. 1981); *Beck v. Smith,* 296 N.W.2d 886, 891-93 (N.D. 1980).[7] Given the importance that the Illinois child custody enforcement scheme places on proper statutory jurisdiction, we do not

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(UCCJEA), N.M. Stat. Ann. 40-10A-108, effective July 1, 2001). Compare PKPA, 28 U.S.C. sec. 1738A(e) (requiring reasonable notice).

7. By contrast, the more recent Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) provides a streamlined enforcement procedure whereby notice of registration is sent to certain interested parties, and the out-of-state order confirmed as a matter of law if those parties entitled to notice do not contest registration within a specified period. See Unif. Child Cust. Jur. & Enf. Act sec. 305, 9 U.L.A. 692-93 (1999). Illinois has not enacted the UCCJEA.

think that the state's interests weigh against providing pre-deprivation process before enforcing an out-of-state order when that order was entered without an adjudication of that court's statutory jurisdiction or whether the order was entered consistent with due process requirements of notice and jurisdiction. *See Duchesne v. Sugarman,* 566 F.2d 817, 828 n.26 (2d Cir. 1977) (stating that "the administrative and fiscal burden to the state can be of no moment" when the procedures were consistent with state requirements). And when we consider the nature of the interests at stake and the gravity of erroneous deprivations to parents and children alike, we conclude that, absent exigent circumstances, due process requires, at a minimum, pre-enforcement notice and some opportunity to object before law enforcement officials may separate a parent from her child pursuant to an out-of-state default order transferring custody.

We therefore hold that Morrell has stated a claim for deprivation, without due process, of her and her child's liberty interest in not being separated, based on the defendants' seizure of Joshua, without prior notice to her in Illinois and without exigent circumstances, pursuant to the default order entered in New Mexico.

B. No Clearly Established Law

We turn next to the second part of the analysis of the defendants' claim of qualified immunity: whether clearly established law prohibited the defendants' conduct. *Katz,* 121 S.Ct. at 2156; *Anderson v. Creighton,* 483 U.S. 635, 640 (1987). To show this, a plaintiff may point to closely analogous cases establishing that the conduct is unlawful, or demonstrate that the violation is so obvious that a reasonable state actor would know that what he is doing violates the Constitution. *See Siebert v. Severino,* 256 F.3d 648, 654-55 (7th Cir. 2001); *Brokaw,* 235 F.3d at 1022; *Vickery v. Jones,* 100 F.3d 1334, 1339 (7th Cir. 1996).

Morrell contends that it was clearly established that due process requires notice and an opportunity to be heard before state actors may interfere with a mother's liberty interest in her child. The statement of the right at this level of generality, however, is of little help in determining the reasonableness of the defendants' conduct. *See Anderson,* 483 U.S. at 639; *Wilson,* 526 U.S. at 614-15. The appropriate question is whether it would be clear to reasonable officials in the defendants' position that enforcing the New Mexico court's order without prior notice or an opportunity to be heard in Illinois was unconstitutional. *See Katz,* 121 S. Ct. at 2156; *Anderson,* 483 U.S. at 639; *Wilson,* 526 U.S. at 615.

With regard to the procedures followed in Illinois, Assistant State's Attorney Mock concluded that he was required to enforce the order without notice to Morrell, based on his reading of the Illinois UCCJA. As we noted above, we disagree with his conclusion about Illinois law. But Morrell has not identified, and we have been unable to find, any authoritative cases considering analogous circumstances that hold that pre-deprivation notice and an opportunity to be heard is required as a matter of constitutional due process before a state may enforce another state's custody order. As we noted earlier, cases concerning the extra-territorial effect of a state's judgment or defining the due process limits of a state's jurisdiction over non-residents *(Williams v. North Carolina,* 325 U.S. 226 (1945), for example), do not speak to the procedures that must be employed in a state asked to enforce an out-of-state order, and do not hold that pre-enforcement notice and hearing is always required. And we do not think that the Illinois judge's denial of Howell's emergency petition for a body attachment compels a different conclusion. Mock had no knowledge of the basis for the judge's denial, and the judge's failure to issue an order was not obviously inconsistent with enforcement of the New Mexico order, given Mock's interpretation that an order from an Illinois judge was not required.

Morrell also contends that the order was, on its face, a "constitutional abomination," and so it should have been obvious to the defendants that it could not be enforced. The only alleged procedural deficiency apparent from the face of the order was the fact that it was entered ex parte after Morrell failed to appear the day after personal service. Morrell has pointed to no cases holding that a single day's notice is, under these circumstances, constitutionally inadequate, and given the court's finding (recited in the order) that Morrell "has intentionally been avoiding service of process," we do not think that notice was obviously infirm.

Finally, Morrell contends that the sheriff's deputies should have recognized that the order could not properly be enforced, based on information they learned when they were shown copies of the Indiana pleadings after they arrived at Morrell's home, specifically, that another paternity action had been instituted by Morrell in Indiana. According to Morrell, they should have known that the New Mexico order was no longer operative because the order recited that the court relinquished jurisdiction once another parentage determination was undertaken:

> If [a] parentage determination is undertaken in So. Carolina or in any other state, New Mexico relinquishes jurisdiction to such other state to determine custody, visitation and child support issues.

Morrell's interpretation of the legal effect of the filing of the Indiana paternity action is a reasonable one, but not the only reasonable one. At Morrell's home, the officers were shown pleadings from the Indiana action, but there was no order or other indication that the Indiana court had asserted jurisdiction. (Indeed, the officers were shown a motion to dismiss that was pending in Indiana based on New Mexico's prior assertion of jurisdiction.) Morrell's lawyer told the officers that the Indiana paternity action "superceded" the New Mexico action, but the officers were not required to rely

on the lawyer's conclusion about the legal effect of the initiation of proceedings in Indiana. *See Marks v. Carmody*, 234 F.3d 1006, 1010 (7th Cir. 2000) ("We are aware of no rule that requires police officers to accept the legal arguments offered by a suspect's attorney."). This is particularly true in light of the fact that Assistant State's Attorney DeVriendt had already made the officers aware of the Indiana action, and specifically advised them that the New Mexico order was the operative one because it was the only one that was filed in Illinois. *See Davis v. Zirkelbach*, 149 F.3d 614, 620-21 (7th Cir. 1998) (police officers who relied on specific advice of attorney were entitled to qualified immunity when the advice was unequivocal and closely tailored to the particular facts, the attorney was the one responsible for rendering such advice, and the police acted promptly upon receiving the advice).

We conclude, therefore, that all defendants are entitled to qualified immunity. Because of our conclusion on the issue of qualified immunity, we need not reach the sheriff's deputies' alternate argument that they were entitled to absolute immunity.

III. CONCLUSION

We are not unmoved by the circumstances presented by this case, and we share Morrell's concerns about the wisdom of authorizing an infant's separation from his mother and removal from the state by someone whom the child has never seen, apparently based on nothing more than the man's assertions that he, and not the mother's husband, was the child's father. Much of our concern is based on the procedures used here, but as we have said, it was not clearly established that the procedures were constitutionally infirm. Therefore, although Morrell has stated a claim for deprivation, without due process, of a protected liberty interest, we hold that the defendants' conduct in seizing her child was not contrary to clearly established law and therefore Affirm the judgment of the district court.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 00-1429

STACEY MORRELL, INDIVIDUALLY AND AS NEXT FRIEND FOR JOSHUA MORRELL, AN INFANT,

Plaintiffs-Appellants,

PHILIP MOCK, JUDY DEVRIENDT, RICHARD ACKERSON, DEPUTY HOLMAN, AND DEPUTY POLENSE,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois
No. 99 CV 2459—**George Lindberg** *Judge.*

[November 1, 2001]

JUDGMENT — ORAL ARGUMENT

Honorable Joel M. Flaum, Chief Judge
Honorable Michael S. Kanne, Circuit Judge
Honorable Ann C. Williams, Circuit Judge

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 00-1429

STACEY MORRELL, INDIVIDUALLY AND AS NEXT FRIEND FOR JOSHUA MORRELL, AN INFANT,

Plaintiffs-Appellants,

PHILIP MOCK, JUDY DEVRIENDT, RICHARD ACKERSON, DEPUTY HOLMAN, AND DEPUTY POLENSE,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois
No. 99 CV 2459—**George Lindberg** *Judge.*

[December 12, 2001]

ORDER

Honorable Joel M. Flaum, Chief Judge
Honorable Michael S. Kanne, Circuit Judge
Honorable Ann C. Williams, Circuit Judge

On consideration of the petition for rehearing and petition for rehearing *en banc,* filed in the above-entitled cause by plaintiffs-appellants, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny. Therefore, the petition for rehearing is hereby DENIED.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 99 CV 2459

STACEY MORRELL, INDIVIDUALLY AND AS NEXT FRIEND FOR JOSHUA MORRELL, AN INFANT,

Plaintiffs,

v.

PHILIP MOCK, JUDY DEVRIENDT, RICHARD ACKERSON, DEPUTY HOLMAN, AND DEPUTY POLENSE,

Defendants.

MEMORANDUM OPINION AND ORDER

LINDBERG, District J.

Plaintiff Morrell brings this action under §1983 asserting that Defendants acted to abduct Plaintiff's child in violation of Illinois law and Plaintiffs' constitutional rights. The action arises from incidents surrounding an order issued by a New Mexico Court concerning the custody of Plaintiff's child. Plaintiff asserts liability against Assistant State's Attorneys Philip Mock and Judy DeVriendt for determining the order was valid and enforceable and directing the Will County Sheriff's Office to seize the child. Plaintiff also seeks to hold liable Defendant Investigator Richard Ackerson and Defendant Deputies Holman and Polense, who are the law enforcement officers who physically removed the child from Plaintiff's home. Plaintiff has moved for summary judgment against Mock. Defendants Ackerson, Holman, and Polense's have filed a motions for summary judgment, and Defendant Mock has filed a motion for summary judgment. For the reasons articulated below, Plaintiff's motion for summary judgment will be denied. Defendants Mock, Ackerson,

Holman, and Polense's motions for summary judgment will be granted. Furthermore, the Court will sua sponte grant summary judgment in favor of Defendant DeVriendt.

I. BACKGROUND

In the summer of 1997, while residing at the Kirkland Air Force Base in Albuquerque New Mexico, Plaintiff Stacey Morrell had a relationship with John Howell. When the relationship ended, Plaintiff reconciled with her husband, David Morrell. In January 1998, Plaintiff and her husband moved from New Mexico to El Paso, Texas. On March 17, 1998, Plaintiff gave birth to Joshua Morrell. Subsequently, John Howell filed a petition to establish paternity in the Second Judicial District Court of the State of New Mexico. On June 18, 1998 Judge Anne Kass of New Mexico entered an order stating in pertinent part:

> IT IS FOUND IN OPEN COURT: Respondent was personally served with an order to appear at 9:00 a.m. the first business day following service. She was personally served on June 17, 1998. She failed to appear at 9:00 a.m. June 18, 1998. Respondent has intentionally been avoiding service of process in this paternity case. Respondent has willfully failed and refused to participate in an orderly process to determine parentage.
>
> IT IS ORDERED IN OPEN COURT:
>
> I. Law Enforcement Authorities are authorized and requested to assist John D. Howell...in obtaining physical custody of a male child born on or about 3/17/98.
>
> II. Upon obtaining physical custody, a parentage determination shall be undertaken. It may be undertaken in New Mexico or in South Carolina as Mr. Howell decides.
>
> III. If parentage determination is undertaken in So. Carolina or in any other state, New Mexico relinquishes

jurisdiction to such other state to determine custody, visitation and child support issues.

IV. Judgment is entered against Stacie J. Morrell in favor of John D. Howell for fees and costs herein of $3,000.00

On June 30, 1998, Plaintiff filed a special appearance in the New Mexico action contesting the jurisdiction of the New Mexico Court. Also around June 30, 1998, Plaintiff moved from Texas to her parents' house in Indiana. On July 16, 1998, Plaintiff filed a petition to establish paternity in Indiana State Court. Howell filed a motion to dismiss Plaintiff's petition and Plaintiff filed an objection to Howell's motion to dismiss. At some point between June 30, 1998 and November 2, 1998, Plaintiff and her husband moved to Steger, Illinois.

On November 2, 1998, Howell filed the New Mexico court order in Will County, and a Will County stamp was affixed to the court order. Later the same day, Howell appeared before Will County Circuit Court Judge Ludwig Kuhar and requested a body attachment so that law enforcement could assist Howell in enforcing the New Mexico Court order. Judge Kuhar declined to issue a body attachment on the face of the New Mexico court order.

After appearing before Judge Kuhar, Howell proceeded to the Will County State's Attorney's Office and spoke with Assistant State's Attorney Misty Turner. Howell told Turner that Judge Kuhar had denied his request for a body attachment. Turner showed the New Mexico court order to Assistant State's Attorney Judy DeVriendt; who reviewed and discussed the order with Howell. Subsequently, DeVriendt telephoned the Steger police and directed them to take the baby from Plaintiff's custody pursuant to the New Mexico court order.

On November 2, 1998, Steger police officers went to Plaintiff's home to take the baby from Plaintiff's custody and deliver the baby to Howell. Plaintiff showed the Steger police officers copies of papers which she had filed in her paternity action in Indiana. The police left without seizing the baby.

On November 4, 1998, Howell returned to the Will County State's Attorney's Office to again try to have the New Mexico court order enforced. On this occasion Howell spoke with Turner. Turner subsequently related to DeVriendt that the Steger police had not taken the baby. DeVriendt took the matter to the Chief of the Will County State's Attorney's Civil Division, Assistant State's Attorney Philip Mock. Mock read the court order and reviewed the Uniform Child Custody Jurisdiction Act (UCCJA). Mock then checked the circuit court clerk computer to ensure that the New Mexico court order was the only one entered in Will County. Mock asserts that he directed subordinates to verify that the order was still valid, and that he was assured that its validity had been confirmed. Finally, Mock reviewed the docket sheet of the proceeding before Judge Kuhar. Mock concluded the order was enforceable and he directed DeVriendt to have the Sheriff's Department enforce the order.

DeVriendt brought the New Mexico order to Lieutenant Van Dyke of the Will County Sheriff's Department. While DeVriendt was present, Van Dyke called Mock who confirmed that the order was valid and should be enforced. Investigator Ackerson was to assist Howell in retrieving the baby. DeVriendt showed Ackerson the New Mexico order which bore a Will County stamp. DeVriendt instructed Ackerson to seize the baby, deliver him to Howell, and to arrest Plaintiff if she failed to cooperate. Deputies Holman and Polense were assigned by their superior to assist Investigator Ackerson in enforcing the court order. Defendant Holman reviewed the court order prior to arriving at Plaintiff's home.

Shortly thereafter Ackerson, Holman, Polense and Howell proceeded to Plaintiff's home. Ackerson informed Plaintiff that they had come to take the baby pursuant to a New Mexico Court order and that if she or her husband failed to comply, they would be arrested. Plaintiff protested and called the attorney who was handling her Indiana paternity action. Plaintiff asserts that at some point during this conversation with her attorney, Ackerson and Holman both spoke with her attorney. In the interim, Polense reviewed the New Mexico order and confirmed to Plaintiff that it looked valid. Plaintiff showed the officers her pleadings from the paternity determination proceeding which was underway in Indiana. Eventually Plaintiff surrendered custody of the child to the deputies. The deputies took the baby outside to Howell, and Howell left with the child.

Once the deputies had gone, Plaintiff went to the Will County Courthouse and filed a petition for an emergency order of protection against Howell. Later that day Plaintiff, Mock, Turner, and DeVriendt appeared before Judge Rozak on Plaintiff's petition for an emergency order of protection. Judge Rozak granted Plaintiff's petition and directed Mock to retrieve the baby from Howell. Ackerson then negotiated with Howell, his attorney, representatives of the Beaufort, South Carolina Sheriff's Department, and military officials at Howell's South Carolina military base, where Howell had returned with the baby. The baby was returned to Plaintiff on November 8, 1998.

II. DISCUSSION

The parties' cross motions for summary judgment are before the Court. Summary judgment will be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). The moving party bears the "initial

responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of fact." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). The nonmoving party must then come forward with specific facts demonstrating that there is a genuine issue for trial. Fed.R.Civ.P. 56(e). The court must review the evidence and draw all permissible inferences in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255 (1986).

A. Defendants Ackerson, Holman and Polense

Defendants Ackerson, Holman and Polense move for summary judgment on the theory that they are entitled to absolute immunity from liability because they acted in accordance with a facially valid court order. Defendants argue that they were merely conducting a quasi-judicial function at the behest of a court. This Court agrees. The Seventh Circuit has held that non-judicial officials whose official duties have an integral relationship with the judicial process are entitled to absolute immunity for their quasi-judicial conduct. *Henry v. Farmers City State Bank,* 808 F.2d 1228, 1238-39 (7th Cir. 1986). *See also, Ashbrook v. Hoffman,* 617 F.2d 474, 476 (7th Cir. 1980) (finding that individuals performing ministerial acts under a judge's supervision and intimately related to judicial proceedings have quasi-judicial immunity). The rationale behind this rule is clear. To subject officers to liability for actions conducted in accordance with a court order, would be to require the officers to perform the function of an appellate court. Under such a scheme, officers would need to judge the soundness and legal merit of a facially valid court order. It is clear that to require officers charged with the execution of judicial mandates to independently assess each mandate's wisdom is "obviously untenable." *Henry,* 808 F.2d at 1239.

Plaintiff argues that absolute immunity is not appropriate for Defendants in the instant action because, "a reasonably well-trained officer in [their] position would have known that the court order was unconstitutional]." *Malley v. Briggs*, 475 U.S. 335 (1986). Plaintiffs correctly argue that reliance on a court order will not shield officers from liability where the order is obviously invalid on its face. However, there is nothing in the record to reflect that the order was, as Plaintiff argues, obviously invalid. On the contrary, the record demonstrates that the order appeared facially valid. It is notable that the putative unconstitutionality of the order was not obvious to the assistant state's attorneys who carefully reviewed and even researched the order. Further, the record reflects that the officers made reasonable attempts to verify the enforceability of the New Mexico order. The officers received and reasonably relied upon legal advice from assistant state's attorneys regarding the validity of the order and its conformity with the UCCJA. Furthermore, each of the officers read the order, and noted that it bore the Will County stamp.

However, rather than focusing on a facial error in the New Mexico order, Plaintiff's argument regarding the obvious invalidity of the New Mexico order addresses substantive legal issues raised by the order. Plaintiff argues that because the officers also read the Indiana pleadings, the officers should have known that the pendency of the South Carolina paternity suit, which was mentioned in the Indiana pleadings, rendered the New Mexico order invalid. Plaintiff argues that the fact that Steger police officers refuse to seize the child when confronted with the same information empirically proves that a reasonable officer would have known the New Mexico order to be invalid. The Court disagrees. To find that complex legal issues underlying the paternity controversy rendered the New Mexico order obviously invalid, the Court would have to find that there was virtually no set of circumstances in which the conduct prescribed by the order

would be constitutional given what the officers knew of the particular situation presented. Here, the facts do not support such a finding. There are circumstances in which a court could validly order a child from its mother for the purpose of determining parentage. Based on the face of the New Mexico order and the advice of the assistant attorneys, the officers believed that the New Mexico order had been validated in Will County, and the Indiana action had not. Such an interpretation is reasonable given the circumstances the confronting the officers. It would be wholly unreasonable to expect the officers to thoroughly second guess not only the issuing court, but the assistant state's attorneys' legal advice as to the validity of the order prior to executing it. The Court therefore holds that the invalidity of the order was not facially obvious to the degree that the officers may be held liable for not perceiving it. Thus, Officers Ackerson, Holman and Polense are entitled to absolute immunity and summary judgment will be granted in their favor.[1]

B. Defendants Mock and DeVriendt

Assistant State's Attorneys Defendants Mock and DeVriendt are entitled to qualified immunity in the instant action.[2] Government officials are entitled to qualified

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1. Even if Ackerson, Holman, and Polense were not entitled to absolute immunity, as outlined supra, they would likely be entitled to qualified immunity as they reasonably relied upon the advice of a prosecuting attorney. *See, Davis v. Zirkelbach,* 149 F.3d 614 (7th Cir. 1998). However, because the Court's absolute immunity conclusion is dispositive, the Court does not reach the qualified immunity question.

2. Defendant DeVriendt has not moved for summary judgment, but it is well established that a district court may grant summary judgment sua sponte where the opposing party has had adequate notice and opportunity to bring forward all its evidence. *Celotex Corp. v. Catrett,* 477 U.S. 317, 326 (1986). Here, Plaintiff has had adequate opportunity to proffer her evidence against DeVriendt as the facts and arguments concerning

immunity from liability for conduct undertaken in the course of their official duties, except where that conduct violates a clearly established constitutional right of which a reasonable person would have been aware. *Harlow v. Fitzgerald,* 457 U.S. 800 (1982). Here, Plaintiff had a constitutional right not to be separated from her child without due process of law. *Bell v. City of Milwaukee,* 746 F.2d 1205 (7th Cir. 1984). However, it is not at all clear that Mock and DeVriendt's actions regarding the execution of the New Mexico order constituted a due process violation that a reasonable person in their position would have recognized. To prevail, Plaintiff must show that the law was clear in relation to the specific facts confronting the Defendants. Here, given the specific facts facing Defendants, it was not clear that Plaintiff's due process rights were in peril. Mock and DeVriendt were presented with an out-of-state order which authorized the seizure of Joshua from Plaintiff. Mock took reasonable measures to establish that the order was valid. He reviewed the Uniform Child Custody Jurisdiction Act, checked the circuit court clerk computer to ensure that the New Mexico court order was the only one entered in Will County, and concluded the order was enforceable. Based on this assessment, Mock directed DeVriendt to have the Sheriff's Department enforce the order, and DeVriendt did so. Plaintiff contends that it was this direction from Mock to DeVriendt, and subsequently from DeVriendt to the Sheriff's Department, that deprived her of her child without due process of law. However, for Mock and DeVriendt to loose the shield of qualified immunity for these actions, the Court would have to find that a reasonable person in their places

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DeVriendt's liability are not materially different to the facts and arguments concerning Mock's liability.

would have known that the New Mexico order was not valid, and therefore ordering the child to be seized was unconstitutional. The Court finds otherwise. Mock's legal determination that the New Mexico order was enforceable under the UCCJA was legally reasonable under the circumstances. Also, Plaintiff can point to no precedent which establishes that conduct analogous to Defendant's conduct constituted a constitutional violation in a factually similar case. Further, it was objectively reasonable for Mock and DeVriendt to presume that Plaintiff had been afforded due process of law when the order was issued, and that Plaintiff had enjoyed adequate opportunity to address any errors which occurred in the judicial process. *See generally, Ellis v. Hamilton,* 669 F.2d 510 (7th Cir.1982). Thus, it was not clearly established that Defendants' conduct was violative of Plaintiff's due process rights in these specific circumstances. Therefore, this Court concludes that Defendants Mock and DeVriendt are shielded from liability by qualified immunity. The Court grants Mock's motion for summary judgment and sua sponte grants summary judgment in favor of DeVriendt.

ORDERED: Plaintiff's motion for summary judgment is denied. Defendant Mock's motion for summary judgment is granted. Defendants Ackerson, Holman, and Polense's motion for summary judgment is granted. The Court grants sua sponte summary judgment in favor of Defendant DeVriendt.

Supreme Court, U.S.
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No. 01-1374 (2)

In the Supreme Court of the United States

STACEY MORRELL, INDIVIDUALLY AND AS NEXT FRIEND FOR JOSHUA MORRELL, AN INFANT,

Petitioners,

v.

PHILIP MOCK, JUDY DEVRIENDT, RICHARD ACKERSON, DEPUTY HOLMAN, AND DEPUTY POLENSE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' JOINT BRIEF IN OPPOSITION

JAMES G. SOTOS
Counsel of Record for Respondents Ackerson, Ploense, and Holman
KIMBERLY D. FAHRBACH
HERVAS, SOTOS, CONDON & BERSANI, P.C.
333 Pierce Road, Suite 195
P.O. Box 4109
Itasca, Illinois 60143-4109
(630) 773-4774

WILLIAM HOLLOWAY
Counsel of Record for Respondent DeVriendt
HINSHAW & CULBERTSON
222 N. LaSalle St., Suite 300
Chicago, Illinois 60601
(312) 704-3748

RONALD L. SANDACK
Counsel of Record for Respondent Mock
LOWIS & GELLEN
200 West Adams Street
Suite 1900
Chicago, Illinois 60606
(312) 364-2500

Midwest Law Printing Company/Photex — Chicago — (312) 321-0220

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QUESTIONS PRESENTED

I.

WHETHER RESPONDENTS' ENTITLEMENT TO QUALIFIED IMMUNITY IS IMPACTED BY THE QUESTIONS PRESENTED IN *HOPE v. PELZER*?

II.

WHETHER THE COURT OF APPEALS CORRECTLY HELD THAT IT WAS NOT CLEARLY ESTABLISHED IN NOVEMBER 1998 THAT RESPONDENTS' ACT OF TEMPORARILY REMOVING PETITIONER'S BABY FROM HER CUSTODY IN ACCORDANCE WITH AN OUT-OF-STATE COURT ORDER THAT HAD BEEN FILED AND ENTERED IN AN ILLINOIS COURT VIOLATED PETITIONER'S CONSTITUTIONAL RIGHTS?

III.

WHETHER DEPUTY SHERIFF RESPONDENTS' REASONABLE RELIANCE ON ADVICE FROM THEIR ATTORNEYS IN ENFORCING THE NEW MEXICO ORDER PROVIDES AN ALTERNATIVE REASON FOR DENYING THE WRIT AS TO PETITIONER'S CLAIMS AGAINST THEM?

IV.

WHETHER DEPUTY SHERIFF RESPONDENTS' ENTITLEMENT TO ABSOLUTE IMMUNITY PROVIDES AN ALTERNATIVE REASON FOR DENYING THE WRIT AS TO PETITIONER'S CLAIMS AGAINST THEM?

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RESPONDENTS' STATEMENT OF CLARIFICATION OF PETITIONER'S FACTS

Certain statements in Petitioner's petition require correction. First, Petitioner states that the "Illinois judge refused to enforce the New Mexico order without notice and a hearing." This statement is not accurate and is not supported by Petitioner's citation to the record. (*See* Pet'r Br. p. 3.) As reflected in the Seventh Circuit's opinion, the Illinois judge simply declined to issue a body attachment without notice and a hearing. (*See* Pet'r App. p. 3.) The record does not support Petitioner's statement that the Illinois judge indicated additional notice and a hearing were required before the New Mexico court order could be enforced. (*See* Pet'r Br. p. 3.)

Second, Respondent Mock's deposition testimony does not support Petitioner's statement that "Mock knew that Howell [the putative father] intended to remove the baby from the State of Illinois before Plaintiff would have an opportunity to seek intervention from an Illinois Court." (*Id.* at 4-6.) As the cited testimony shows, Mock knew only that Howell *might* take the child to South Carolina for paternity testing. (*See id.*)

Third, Petitioner erroneously claims that the Will County Sheriff's Deputies ("Deputy Respondents") knew that Howell was going to take the baby out of Illinois. (*See id.* at 6.) Petitioner fails to include a citation in support of this statement, and there is nothing in the record suggesting that Deputy Respondents possessed such information.

Fourth, Petitioner incorrectly states that the "Steger officers agreed with [P]etitioner's interpretation of the New Mexico order and left." (*See id.* at 4.) Again, Petitioner does not include a citation to the record to support

this statement. Further, the record below shows that no such evidence was adduced in this case.

Finally, Petitioner's statement omits numerous pertinent facts set forth in the Seventh Circuit's opinion which more fully describe the circumstances under which Petitioner's baby was removed from her custody and the roles the individual Respondents played in that act. Specifically, at the time Respondents enforced the order, Petitioner believed that John Howell was the father of her child, as she and Howell had an affair in New Mexico in 1997. (*See* Pet'r App. p. 2.) Additionally, the New Mexico court gave Petitioner an additional chance to appear and contest Howell's petition for paternity. (*Id.*) When Petitioner failed to appear at the initial hearing, the court ordered that Petitioner be served personally and set the hearing for the following day after she received that service. (*See id.*) Subsequently, Petitioner was hand-delivered a notice to appear in the New Mexico state court. (*See id.*) Petitioner ignored that notice and failed to appear. (*Id.*) It was during that second hearing that the New Mexico court entered the order at issue. (*See id.* at 2-3.)

Petitioner's statement also omits facts regarding Respondents' actions upon becoming aware of Howell's attempt to enforce the New Mexico order. First, Petitioner fails to state that Respondent DeVriendt, an assistant state's attorney, consulted with her supervisor, Respondent Mock, the chief of the civil division, regarding the validity of the New Mexico order. Upon being advised of the situation, Respondent Mock then: (1) reviewed the docket sheet from the Illinois court hearing on the body attachment request; (2) researched the Illinois Uniform Child Custody Jurisdiction Act (UCCJA); (3) checked the court's computer database to ascertain

whether any other orders or judgments had been filed in Will County; and (4) verified that the New Mexico order was valid. (*See id.* at 4.) Believing the order had to be enforced, Respondent Mock then directed Respondent DeVriendt to have Deputy Respondents enforce the order. (*Id.* at 4.)

REASONS WHY CERTIORARI SHOULD BE DENIED

I.

RESPONDENTS' ENTITLEMENT TO QUALIFIED IMMUNITY IS NOT IMPACTED BY THE QUESTIONS PRESENTED IN *HOPE v. PELZER*

Contrary to Petitioner's suggestion (*see* Pet'r Br. p. 7.), this case does not present a question similar to the one currently before the Court in *Hope v. Pelzer*, 240 F.3d 975 (11th Cir. 2001), *cert. granted*, 122 S. Ct. 802 (U.S. Jan. 4, 2002) (No. 01-309), *cert. amended*, 122 S. Ct. 933 (Jan. 29, 2002). In amending its order granting the petition for writ of certiorari in *Hope*, this Court limited the issues to whether: (1) tying a prisoner to a "hitching post" violates clearly established rights for the purposes of qualified immunity, and (2) a constitutional right is clearly established for qualified immunity purposes "by a case presenting facts 'materially similar' to those in the plaintiff's case." *See Hope*, 122 S. Ct. 933.

Neither of the issues in *Hope* parallel any issue in this case. As this case is not a prisoner rights case, and it certainly does not involve a hitching post, Petitioner evidently presumes that both cases concern the degree of factual similarity required of existing case law for a constitutional violation to be deemed clearly established.

Petitioner's attempt to link the two cases on the basis of such a proposition is misguided.

In *Hope* this Court is faced with the specific question of whether a previous case, *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974), "clearly established for qualified immunity purposes" that tying the plaintiff to a hitching post was unconstitutional. The answer to the question may depend upon the Court's selection of some standards to govern the degree of factual similarity required between existing case law and a set of facts confronting an official to clearly establish the constitutional right at issue. In *Hope* the Eleventh Circuit held that a case must have "materially similar facts" to satisfy this threshold, and *Gates* did not meet that criteria. Accordingly, one question this Court may reach in *Hope* is whether the Eleventh Circuit's "material similarity" requirement comports with this Court's rejection of the "fundamentally similar" standard in *United States v. Lanier*, 520 U.S. 259 (1997).[1]

This Court's resolution of these issues in *Hope* does not affect the application of qualified immunity in this case because there is not even a remotely analogous case which would have put respondents on notice that their conduct was constitutionally infirm. In fact, Petitioner's brief is devoid of any case—from this Court, the Seventh Circuit or anywhere else—that bears any resemblance to the challenged conduct in this case. Instead, Petitioner argues that a reasonable official in Respondents' position would have realized it was obvious that what they

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[1] In *Lanier* the Court examined the "fundamentally similar" standard in the context of a criminal prosecution of a state official for civil rights violations under 18 U.S.C. §242, but equated the "fair warning" prerequisite for criminal liability with qualified immunity from civil liability.

were doing was unconstitutional. *See Brokaw v. Mercer County*, 235 F.3d 1000, 1022 (7th Cir. 2000) (instead of identifying a closely analogous case, a plaintiff may establish a clearly established constitutional right by showing that the violation was so obvious that a reasonable person would have known of the unconstitutionality of the conduct at issue). *See also Lanier*, 520 U.S. at 271 (noting that the absence of precedent prohibiting welfare officials from selling foster children into slavery would not entitle officials to immunity against such allegations). Respondents do not contest that a plaintiff may defeat a qualified immunity defense in this manner. Here, however, the Seventh Circuit expressly considered and rejected Petitioner's claims of obviousness, reasoning that Respondents' interpretation of the law and procedures required to enforce the order were reasonable. (Pet'r App. pp. 18-19.)

Hope thus concerns a distinct application of the qualified immunity analysis—the degree of factual similarity required of a previous case in order to clearly establish the constitutional right at stake. Petitioner, on the other hand, relies not on a factually similar case but on broad general propositions and the "obviousness" of Respondents' conduct to defeat their qualified immunity defense. As a result, any standard of factual similarity enunciated in *Hope* will be immaterial to analyzing the Seventh Circuit's holding that these Respondents are afforded the protections of qualified immunity. Therefore, *Hope* should not serve as a basis for granting the writ of *certiorari* in this case.

II.

THE COURT OF APPEALS CORRECTLY HELD THAT IT WAS NOT CLEARLY ESTABLISHED IN NOVEMBER 1998 THAT RESPONDENTS' ACT OF TEMPORARILY REMOVING PETITIONER'S BABY FROM HER CUSTODY IN ACCORDANCE WITH AN OUT-OF-STATE COURT ORDER THAT HAD BEEN FILED AND ENTERED IN AN ILLINOIS COURT VIOLATED PETITIONER'S CONSTITUTIONAL RIGHTS

The Seventh Circuit held that, although Respondents violated Petitioner's due process rights by enforcing the New Mexico court order before providing Petitioner with notice and an opportunity to be heard in Illinois, Respondents were entitled to qualified immunity for temporarily transferring custody of Petitioner's child. (*See* Pet'r App. pp. 16-19.) Contrary to Petitioner's assertion, this grant of immunity was not based on the mere absence of an "authoritative" case with analogous circumstances. (Pet'r Br. pp. 7-8.) Instead, the court of appeals' conclusion was correctly premised upon finding that Respondents' enforcement of the New Mexico order was reasonable.

This reasoning comports with this Court's rulings on the qualified immunity doctrine. *See Anderson v. Creighton*, 483 U.S. 635 (1987). Indeed, this Court's rulings illustrate that qualified immunity serves to allow government officials reasonable leeway to perform their duties free from the threat of civil liability. *See Davis v. Sherer*, 468 U.S. 183, 196 (1984). To ensure that this purpose is fulfilled, qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law" from liability. *Hunter v. Bryant*, 502 U.S. 224, 229 (1991). As this Court reiterated just last year, the dispositive question in applying qualified immunity is whether it would be clear to a reasonable official that his conduct was unlawful "in the situation he confronted." *Saucier v.*

Katz, 533 U.S. 194, 202 (2001); *Wilson v. Layne*, 526 U.S. 603, 615 (1999).

In this case the Seventh Circuit correctly held that, although it was clear in November 1998 that a mother was entitled to due process regarding the removal of her child, it was quite unclear as to what procedures were required to protect that right—especially when another state had already afforded the mother due process. (Pet'r App. p. 17.) Simply put, there was nothing in the law that would have put Respondents on notice that the UCCJA's custody enforcement provisions, as described below, were unconstitutional or invalid, or that Petitioner was entitled to additional procedures before the order could be enforced.

In this respect, a review of the "particularized" and "specific" facts surrounding Respondents' removal of Petitioner's child shows that Respondents acted reasonably in enforcing the order and are entitled to qualified immunity. *Anderson*, 483 U.S. at 639. Initially, the New Mexico order, which had been filed in the Will County, Illinois, circuit court recited that Petitioner was "intentionally avoiding service of process" and had "wilfully failed and refused to participate" in a process to determine parentage of the baby. The order also directed that "[l]aw enforcement authorities are authorized and requested to assist" Howell in obtaining physical custody of a male child born on or about March 17, 1998.

The actions Respondents took upon being presented with this facially valid order were reasonable. *See Saucier*, 533 U.S. at 202-03. Respondent DeVriendt, the assistant state's attorney who initially reviewed the order, consulted with her superior, Respondent Mock, about the order's validity. Mock, the chief of the state's attorney's civil division, then checked the New Mexico

docket to determine if the order had been vacated, appealed, or stayed. Upon learning the order had not been modified in any way, he reviewed the local Will County docket to determine whether the New Mexico order had been modified or stayed. It had not. Instead, a certified copy of the New Mexico order was properly registered in Will County. Mock then consulted the UCCJA to ascertain whether anything else had to be done before Illinois could enforce the order.

In performing his research, Mock discovered that under the UCCJA, once an out-of-state custody order is filed in Illinois, the order "has the same effect and shall be enforced in like manner as a custody judgment rendered by a court of this state." *See* 750 Ill. Comp. Stat. 35/16 (West 1998); *accord* Unif. Child Custody Jurisdiction Act § 15 (1968). As a result, Mock concluded that the procedures for recording the New Mexico order in Illinois had been satisfied and informed Respondent DeVriendt to direct Deputy Respondents that the New Mexico order was valid and had to be enforced.

To defeat Respondents' entitlement to qualified immunity under these undisputed facts, Petitioner must point to cases establishing that a reasonable officer could not have believed that enforcing the order under these circumstances was lawful. *See Saucier*, 533 U.S. at 202-03; *Anderson*, 483 U.S. at 639. To this day, Petitioner is unable to do so. *Cf. Williams v. Blaisdell*, 173 F. Supp. 2d 574, 581 (N.D. Tex. 2001) (granting qualified immunity to police officer who removed baby from plaintiff-mother's custody pursuant to father's statements regarding the provisions of a custody order that officer did not view). Instead, Petitioner relies on general propositions to defeat Respondents' qualified immunity defense.

Specifically, Petitioner argues that Respondents acted unreasonably because it was clearly established that: (a) general principles of territorial jurisdiction prohibited enforcement of the order; (b) a putative father in Howell's position had no rights to the child so that enforcement of the order was unconstitutional; and (c) a mother had a liberty interest in her child that afforded her the protections of due process. (Pet'r Br. pp. 7-10.) Notwithstanding these contentions, none of the authorities cited by Petitioner in support of these "general propositions" indicates that it was clearly established in November 1998 that a mother was entitled to pre-enforcement notice and a hearing as a prerequisite to enforcement of a facially valid out-of-state order. *See Anderson*, 483 U.S. at 639.

A. General Principles Of Territorial Jurisdiction Did Not Establish That Petitioner Was Entitled To Pre-enforcement Notice And A Hearing

Petitioner's argument that enforcement of the New Mexico order violated fundamental principles of territorial jurisdiction is incorrect. The cases Petitioner cites stand only for the proposition that a state cannot enforce its own order in another state and that a state may establish its own rules for enforcement of an out-of-state court order. *See Pennoyer v. Neff*, 95 U.S. 714, 720 (1877) *overruled in part by Shaffer v. Heitner*, 433 U.S. 186 (1977); *McElmoyle ex rel. Bailey v. Cohen*, 13 Pet. (38 U.S.) 312, 325 (1839). Neither case even tangentially supports Petitioner's contention that a state is prohibited from enforcing another state's order.

To the contrary, a state must give full faith and credit to judicial proceedings of another state. *See* U.S. Const. art. IV, § 1, cl. 1. Otherwise, a state would be free to act

as an independent foreign sovereignty and "ignore obligations created under the laws or by the judicial proceedings of" other states. *Milwaukee County v. M.E. White Co.*, 296 U.S. 268 (1935). The repercussions of such a scheme are the prevalence of forum shopping, with unsatisfied parties simply traveling from state to state relitigating the same issue until he is able to obtain a favorable result.

In recognition of such schemes, in 1968, the UCCJA was enacted to (1) deter the unilateral removal of children from one state to another in order to obtain foreign custody awards, (2) avoid re-litigation of custody decisions of other states, and (3) facilitate enforcement of custody decrees of other states. *See, e.g.*, Unif. Child Custody Jurisdiction Act § 1; 750 Ill. Comp. Stat. 35/2 (West 1998); *Wilkinson v. Russell*, 182 F.3d 89, 98 (2d Cir. 1999), *cert. denied*, 528 U.S. 1155 (2000); *Dagher v. Dagher*, 495 N.E.2d 1004, 1006 (Ill. App. Ct. 1986). Accordingly, the UCCJA provides that a court "*shall* recognize and enforce an initial or modification decree of a court of another state" that has adopted the UCCJA or similar provisions. *See* Unif. Child Custody Jurisdiction Act § 13; 750 Ill. Comp. Stat 35/14 (West 1998). As the 1999 commentary to the UCCJA advises, a state's recognition and enforcement of an out-of-state order is *mandatory* under this section. *See* Unif. Child Custody Jurisdiction Act § 13 commentary.

In this respect, the UCCJA version adopted in Illinois provides that an out-of-state order filed in the office of the clerk of any circuit court of Illinois is to be treated as a judgment entered by an Illinois court. *See* 750 Ill. Comp. Stat. 35/16 (West 1998); *accord* Unif. Child Custody Jurisdiction Act § 15. Section 16 is the only procedural provision contained in the UCCJA regarding the

enforcement of out-of-state orders; there is no other provision stating that, before a state enforces an out-of-state order, it must serve the opposing party with additional notice. To the contrary, under the UCCJA an out-of-state order is enforceable as soon as it is filed in the state. *See Gasaway v. Gasaway*, 616 N.E.2d 610, 613 (Ill. App. Ct. 1993); *In re Mauro*, 543 N.E.2d 856, 858 (Ill. App. Ct. 1989); *Roehl v. O'Keefe*, 256 S.E.2d 375, 377 (Ga. 1979); *Grun v. Grun*, 496 A.2d 1183, 1187 (Pa. Super. Ct. 1985); *Holm v. Smilowitz*, 840 P.2d 157, 164 (Utah App. Ct. 1992). Under these circumstances, the principles of territorial jurisdiction on which Petitioner relies are inapplicable. Not only does the UCCJA expressly allow states to enforce each other's custody orders, but the absence of any notice provision indicates that notice is not required before such enforcement.[2]

B. This Court's Ruling In *Michael H. v. Gerald D.* Did Not Establish That Petitioner Was Entitled To Pre-enforcement Notice With Respect To The New Mexico Order

Petitioner's argument that Respondents should have refused to enforce the order because the law is clear that Howell, a "potential father," is not afforded constitutional protections is similarly flawed. In *Michael H. v. Gerald*

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[2] Certainly, had the National Conference of Commissioners intended there to be any other requirements before a state can enforce an out-of-state custody order, it could have included such a provision in the UCCJA, as it did in the Uniform Enforcement of Foreign Judgments Act (UEFJA). *See* Unif. Enforce. Foreign J. Act §§ 3, 8 (1964); 735 Ill. Comp. Stat. 5/12-650 *et seq.* (West 1998). Nevertheless, the UCCJA, which was enacted after the UEFJA, states that the only requirement is filing the order in the other state. *See id.*

D., 491 U.S. 110 (1989), the case Petitioner cites in support of her argument, a plurality of this Court upheld a California law that precluded a putative father from establishing paternity over a child born into another man's marriage. *Michael H.*, 491 U.S. at 127. Contrary to Petitioner's apparent belief, this Court did not hold that the states are prohibited from granting a putative father the right to establish paternity over his child under such circumstances. In fact, in casting the decisive vote in *Michael H.*, Justice Stevens concurred only in the judgment, stating that he assumed the father could have a protected liberty interest in the child. *Id.* at 133 (Stevens, J., concurring in judgment).

Several state courts have since held that, even if a putative father does not have a liberty interest under the federal due process clause, a putative father does have rights pursuant to that state's statutes or constitution. *See* 750 Ill. Comp. Stat. 50/1 *et seq.* (West 2000); *In Re Kirchner*, 649 N.E.2d 324 (Ill.) *cert. denied*, 515 U.S. 1152 (1995); *State v. Stone*, 474 S.E.2d 554, 561 (Va. 1996); *Ban v. Quigley*, 812 P.2d 1014 (1990), *review dismissed by* 820 P.2d 643 (1991); *In re J.W.T.*, 872 S.W.2d 189, 196-97 (Tex. 1994); *Smith v. Jones*, 566 So.2d 408 (La. Ct. App.), *writ denied sub nom., Kemph v. Nolan*, 569 So.2d 981 (La. 1990); *J.W.P. v. W.W.*, 604 A.2d 695 (N.J. 1990), *aff'd*, 604 A.2d 603 (1991); *M.J.C. v. D.J.*, 572 N.E.2d 562 (Mass. 1991); *Van Nostrand v. Oliveieri*, 427 So.2d 374 (Fla. Dist. Ct. App. 1993); *Weidenbacher v. Duclos*, 661 A.2d 988, 999 (Conn. 1995). Indeed, over two-thirds of the states now give putative fathers a right to rebut the presumption that a child born in wedlock is the issue of the marriage. *See Weidenbacher*, 661 A.2d at 999 (citing Traci Dallas, *Rebutting the Marital Presumption: A Development Relationship Test*, 88 Colum. L. Rev. 369, 373-74 (1988)).

Under these circumstances, Petitioner's assertion that Respondents should have ignored the New Mexico order because it contravenes the "principle" of *Michael H.* is misguided. Nothing in *Michael H.* limits the protections a state may bestow a putative father under that state's own constitution. Likewise, *Michael H.* is silent on what pre-enforcement procedures are necessary before an out-of-state custody order may be enforced. Consequently, *Michael H.* does not assist Petitioner in her quest to show that it was clearly established that she was entitled to pre-enforcement notice before Respondents could enforce the order.

C. Cases Holding That A Mother Has A Liberty Interest In Her Child Did Not Establish That Petitioner Was Entitled To Pre-enforcement Notice And A Hearing With Respect To The New Mexico Order

Respondents readily acknowledge that a mother has a liberty interest in the custody of her child. However, that right is not absolute, and due process is satisfied so long as she receives notice and an opportunity to be heard. *See Matthews v. Eldridge*, 424 U.S. 319 (1976); *Draghi v. County of Cook*, 184 F.3d 689, 693 (7th Cir. 1999). In this case, Petitioner indisputably received notice and an opportunity to be heard prior to issuance of the New Mexico order at issue, which is precisely what the UCCJA requires. *See* Unif. Child Custody Jurisdiction Act § 4; 750 Ill. Comp. Stat. 35/5 (West 1998). In fact, she received hand-delivered notice to appear in the New Mexico court for purposes of addressing Howell's specific petition regarding custody. Thus, Petitioner received her due process. *See Matthews*, 424 U.S. at 348-49. She simply failed to take advantage of her opportunity to be heard.

Although the Seventh Circuit ultimately concluded that the federal due process clause entitled Petitioner to additional pre-enforcement procedures in Illinois in addition to the aforementioned pre-judgment procedures she received in New Mexico, the Court found nothing in the law that would have given Respondents fair warning that these additional procedures were required. Indeed, the Court of Appeals arrived at its conclusion that Petitioner was entitled to pre-enforcement notice by extrapolating general propositions from other due process cases. Accordingly, since Respondents acted in accordance with a reasonable interpretation of the law, albeit a different interpretation than the one ultimately reached by the Seventh Circuit, they were entitled to qualified immunity. (*See* Pet'r App. pp. 16-19.)

Moreover, additional protections were available to Petitioner after custody of her child was transferred. Indeed, due process is denied only if the state fails to provide adequate machinery for the correction of errors that occur in legal proceedings. *See Ellis v. Hamilton*, 699 F.2d 510, 514 (7th Cir. 1982). Here, Petitioner could have pursued post-deprivation proceedings in New Mexico. Additionally, Petitioner could have sought redress in Illinois, as five months passed between the time the New Mexico order was entered and the time Deputy Respondents enforced the order. Petitioner even knew that Howell was trying to have the order enforced prior to the time Deputy Respondents came to her house because another law enforcement agency notified her of the existence of the order and Howell's efforts to enforce it.

Petitioner failed to take advantage of any of these opportunities to challenge what she considered to be an invalid order. Instead, she waited until after Respondents enforced the order to do anything. Even then,

however, Petitioner obtained relief through the Illinois court system. As such, Petitioner received all the due process that was required. *See Ellis*, 699 F.2d at 514.

III.

DEPUTY SHERIFF RESPONDENTS' REASONABLE RELIANCE ON ADVICE FROM THEIR ATTORNEYS IN ENFORCING THE NEW MEXICO ORDER PROVIDES AN ALTERNATIVE REASON FOR DENYING THE WRIT AS TO PETITIONER'S CLAIMS AGAINST THEM

The petition for certiorari should be denied as to Petitioner's claims against the Deputy Sheriff Respondents on the alternative basis that they reasonably relied on attorney advice in enforcing the New Mexico order. Courts have repeatedly held that in situations where reasonable attorneys could disagree on the interpretation of a law, an official who reasonably acts pursuant to an attorney's advice is entitled to qualified immunity. *See, e.g., Davis v. Zirkelbach*, 149 F.3d 614, 619-20 (7th Cir. 1998), *cert. denied*, 525 U.S. 1121 (1999); *Hollingsworth v. Hill*, 110 F.3d 733, 740-41 (10th Cir. 1997); *England v. Hendricks*, 880 F.2d 281, 284 (10th Cir. 1989); *Lavicky v. Burnett*, 758 F.2d 468, 476 (10th Cir. 1985); *Arnsberg v. United States*, 757 F.2d 971, 981 (9th Cir. 1985), *cert. denied*, 475 U.S. 1010 (1986). This rule is based upon the principle that the attorney's advice prevented the officials from knowing that their actions were unconstitutional. *See Davis*, 149 F.3d at 619-20.

While following routine advice of counsel does not always entitle a public official to immunity (*see Davis*, 149 F.3d at 620; *V-1 Oil Co. v. Wyoming*, 902 F.2d 1482, 1488-89 (10th Cir.), *cert. denied*, 498 U.S. 920 (1990)), following attorney advice that is specifically tailored to a "more unusual" situation does warrant application of

qualified immunity, even when the law was clearly established. *See Davis*, 149 F.3d at 620. This case qualifies as such a situation.

Certainly, the situation presented to Deputy Respondents was anything but typical. They were presented with an out-of-state custody order that authorized them to transfer custody of the baby from its mother to Howell. In the face of this situation, Deputy Respondents did not act hastily, as they were not ignorant of the consequences of enforcing the order. Instead, they consulted the County's assistant state's attorney Respondent DeVriendt and asked for guidance. In turn, Respondent DeVriendt consulted with her supervisor, Respondent Mock, and made him aware of the circumstances surrounding the order.

At the time, Mock was chief of the civil division of the State's Attorney's Office and legal advisor to the Sheriff's Department. Upon being advised of the situation, Mock reviewed the UCCJA, docket sheet, and computer records. Mock proceeded to interpret the order knowing that Deputy Respondents would rely on his advice to enforce the order. *See Davis*, 149 F.3d at 620. Mock then told Respondent DeVriendt to inform Deputy Respondents that the order was valid and had to be enforced. Further, Mock told Sheriff's Lieutenant Van Dyke that if he did not enforce the order, he could be held in contempt.

Against this backdrop, Deputy Respondents are entitled to qualified immunity even if it was clearly established that it was unconstitutional to temporarily remove the baby from Petitioner's custody. Mock administered specific direction to Deputy Respondents that the New Mexico order had to be enforced against Petitioner; he did not offer broad advice about the validity of custody orders or the duties of law enforcement officials in gen-

eral. *See Hollingsworth*, 110 F.3d at 741, 742 n.3. Additionally, there was no delay between the time Mock administered his direction to the Deputy Respondents and the time they acted upon it so that the validity of the order could have changed. *See Davis*, 149 F.3d at 620.

Indeed, that Deputy Respondents consulted their legal advisor and then followed that advice tends to vitiate any argument that they knew or should have known that their actions violated Petitioner's constitutional rights. *See McElveen v. County of Prince William*, 725 F.2d 954, 958 n.5 (4th Cir.), *cert. denied, Prince William County v. Hutto*, 469 U.S. 819 (1984). Truly, Deputy Respondents had no reason to believe that Mock's advice was erroneous. *See Davis*, 149 F.3d at 620; *Arnsberg*, 757 F.2d at 981 (officers are simply not required to "second-guess the legal assessments of trained lawyers"). As a result, because Deputy Respondents had an "objectively reasonable" belief in the lawfulness of their actions, and Mock's direction essentially prevented them from knowing that their actions were unconstitutional, they are independently entitled to qualified immunity. *See Hollingsworth*, 110 F.3d at 742; *Arnsberg*, 757 F.2d at 981.

IV.

DEPUTY SHERIFF RESPONDENTS' ENTITLEMENT TO ABSOLUTE IMMUNITY PROVIDES AN ALTERNATIVE REASON FOR DENYING THE WRIT AS TO PETITIONER'S CLAIMS AGAINST THEM

As the Seventh Circuit held that all Respondents are entitled to qualified immunity for their actions, it did not reach Deputy Respondents' alternative argument that absolute immunity also serves to bar Petitioner's claims against them. As the federal district court correctly held, however, Petitioner's claims against Deputy Respondents

are also barred under the doctrine of absolute immunity. (*See* Pet'r App. pp. 27-29.)

It is well settled that a public official who executes a facially valid court order is immune from liability for any acts authorized by that order. *See, e.g., Henry v. Farmers City State Bank*, 808 F.2d 1228, 1238-39 (7th Cir. 1986). As the First Circuit has noted, a nonjudicial officer who is delegated judicial duties in aid of a court should not be a "lightning rod" for harassing litigation. *Kermit Construction Corp. v. Banco Credito Y Ahorro Ponceno*, 547 F.2d 1, 3 (1st Cir. 1976). Indeed, allowing an individual to bring a § 1983 suit against a public official for damages resulting from his execution of a court order would require the official to act as an appellate court and force him to review the validity of a court order before acting on it. *Henry*, 808 F.2d at 1239; *see also Wollin v. Gondert*, 192 F.3d 616, 624 (7th Cir. 1999). Such a result is "obviously untenable." *Henry*, 808 F.2d at 1239. If a party wishes to contest the legality of a court order, the procedure is to appeal that order, not to sue the official responsible for its execution. *Id.* Accordingly, only if the official knew the order constituted "an unacceptable error indicating gross incompetence or neglect of duty" would the official lose his immunity.[3] *Wollin*, 192 F.3d at 624; *accord Malley v. Briggs*, 475 U.S. 335, 345 n.9 (1986).

Here there is no evidence that the New Mexico court order authorizing Deputy Respondents to transfer custody of the baby was entered pursuant to a neglect of

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[3] While the Seventh Circuit in *Wollin* did not specifically state that its decision rested on absolute immunity grounds, it approvingly relied on the *Henry* court's absolute immunity analysis. *Wollin*, 192 F.3d at 624-25.

duty or gross incompetence. The order contained the judge's signature, listed a date, and identified the parties involved. It indicated that Petitioner had notice of the hearing and that Petitioner was willfully failing to participate in the process. The order then provided that law enforcement officials were authorized to assist Howell in obtaining physical custody of the baby, and only after Howell "obtain[ed] physical custody" *and* undertook a parentage determination would the court relinquish jurisdiction. Finally, a Will County court stamp was affixed to the order, which showed that it had been filed in Illinois pursuant to 750 Ill. Comp. Stat. 35/16 (West 1993). In other words, the order did not in any way appear incomplete or invalid on its face so that an inference could be made that the judge who issued it made "an unacceptable error indicating gross incompetence or neglect of duty." *See Wollin*, 192 F.3d at 624.

To find that Deputy Respondents should have conducted any more inquiry into the validity of the New Mexico order prior to enforcing it would obligate them to perform a duty they do not have. Deputy Respondents' only role was to enforce the order, an act for which they are entitled to immunity. *See Henry*, 808 F.2d at 1239; *Tymiak v. Embedded*, 676 F.2d 306, 308 (8th Cir. 1982); *Slotnick v. Garfinkle*, 632 F.2d 163, 166 (1st Cir. 1980); *Lockhardt v. Hoenstine*, 411 F.2d 455, 460 (3d Cir.), *cert. denied*, 396 U.S. 941 (1969). Therefore, because the doctrine of absolute immunity provides an alternate basis for affirming the Seventh Circuit's judgment in favor of Deputy Respondents, the petition for a writ of *certiorari* as to Petitioner's claims against Deputy Respondents should be denied.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

JAMES G. SOTOS
Counsel of Record for Respondents Ackerson, Ploense, and Holman
KIMBERLY D. FAHRBACH
HERVAS, SOTOS, CONDON & BERSANI, P.C.
333 Pierce Road, Suite 195
P.O. Box 4109
Itasca, Illinois 60143-4109
(630) 773-4774

WILLIAM HOLLOWAY
Counsel of Record for Respondent DeVriendt
HINSHAW & CULBERTSON
222 N. LaSalle St., Suite 300
Chicago, Illinois 60601
(312) 704-3748

RONALD L. SANDACK
Counsel of Record for Respondent Mock
LOWIS & GELLEN
200 West Adams Street
Suite 1900
Chicago, Illinois 60606
(312) 364-2500